IN THE UNITED ... FOR THE NORTHERN DISTRICT ... DIVISION

extra copy for Court

FITCH, EVEN, TABIN & LUEDEKA

SUITE 900 - 135 SOUTH LA SALLE STREET

CHICAGO, ILLINOIS 60603

(312) 372-7842

CABLE ADDRESS "PATLAW"

FOUNDED IN 1859 AS GOODWIN, LARNED & GOODWIN

WILLIAM E. ANDERSON
OF COUNSEL

JULIUS TABIN
J. BRUCE McCUBBREY
ADMITTED TO CALIFORNIA BAR
401 RUSS BUILDING
SAN FRANCISCO, CALIF. 94104
(415) 981-8008

EDWIN M. LUEDEKA
PAUL E. HODGES
ROBERT E. PITTS
ADMITTED TO TENNESSEE BAR
SUITE 1230 - 505 GAY STREET, S.W.
KNOXVILLE, TENNESSEE 37902
(615) 546-4305

EDWIN M. LUEDEKA
MORGAN L. FITCH, JR.
FRANCIS A. EVEN
JULIUS TABIN
JOHN F. FLANNERY
ROBERT K. SCHUMACHER
ROBERT B. JONES
DONALD L. WELSH
JAMES J. SCHUMANN
R. STEVEN PINKSTAFF
J. BRUCE McCUBBREY
JAMES R. McBRIDE
JAMES J. KAMILL
A. SIDNEY KATZ
PAUL E. HODGES *
JAMES J. MYRICK

PHILLIP H. WATT
RAIFORD A. BLACKSTONE, JR.
RICHARD L. WOOD
ROGER D. GREER
JOSEPH F. SCHMIDT
GARY W. McFARRON
ROBERT E. PITTS *

* ADMITTED TO TENNESSEE BAR ONLY

November 18, 1975

Honorable Joel M. Flaum
United States District Court
for the Northern District of Illinois
United States Court House
219 South Dearborn Street
Chicago, Illinois 60604

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JOEL M. FLAUM
U. S. DISTRICT COURT JUDGE

Re: The Magnavox Company, et al. -vs-
Bally Manufacturing Corporation, et al.
Civil Action No. 74 C 1030
Our File No. 33656

Dear Judge Flaum:

On November 17, counsel for plaintiffs, Magnavox and Sanders, in the above-identified action advised you that they filed on November 14 in the United States District Court for the Southern District of New York, in Midway Mfg. Co. v. The Magnavox Company and Sanders Associates, Inc., Civil Action No. 74 CIV. 1657 CBM, a motion for reconsideration of the decision of Judge Motley denying their motion to transfer that earlier filed action to Chicago, dismiss or stay. With their letter to you they enclosed copies of various papers including ones which they had filed in the New York action.

Although counsel for Magnavox and Sanders stated that their motion for reconsideration in New York was based on the occurrence of new facts, any new facts are not sufficiently different from the facts considered by the Magistrate and the Court in New York to justify reconsideration. Moreover, they are completely irrelevant to the issues raised by Midway's pending motion in this Court to sever and transfer. For the sake of completeness of the record, we are enclosing

FOR THE NORTHERN [illegible]
EASTERN DIVISION

Honorable Joel M. Flaum
United States District Court
for the Northern District of Illinois
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Re: The Magnavox Company, et al. -vs-
Bally Manufacturing Corporation, et al.
Civil Action No. 74 C 1030
Our File No. 33656

herewith a copy of Midway's memorandum in opposition to the Magnavox and Sanders motion to reconsider which will be filed tomorrow in New York.

Respectfully,

FITCH, EVEN, TABIN & LUEDEKA

By: Donald L. Welsh
Donald L. Welsh

Attorneys for Defendant Midway Mfg. Co.

DLW:mc
Encs.

cc: Theodore W. Anderson, Esq.
Melvin M. Goldenberg, Esq.
Edward C. Threedy, Esq.
William M. Lee, Esq.

FOR THE NORTHERN [illegible] EASTERN DIVISION

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MIDWAY MFG. CO., a corporation, Plaintiff, v. THE MAGNAVOX COMPANY, a corporation, and SANDERS ASSOCIATES, INC., a corporation, Defendants.	)	ACTION NO. 74 CIV. 1657 CBM

PLAINTIFF'S MEMORANDUM IN OPPOSITION
TO DEFENDANTS' MOTION FOR RECONSIDERATION

There is absolutely no merit in defendants' motion for reconsideration of this Court's Decision of November 7, 1975, denying defendants' previous motion to transfer, dismiss or stay this action. The motion to reconsider, therefore, should be denied forthwith. No new facts are presented that would lead to any other conclusion, and defendants' supporting memorandum merely seeks to rehash, again, the same arguments previously presented to Magistrate Hartenstine and to the Court following the Magistrate's report. Further, defendants' memorandum actually contains false and misleading statements of fact.

First, the recently filed "California case" (filed in July, 1975) was already argued in defendants' comments on Magistrate Hartenstine's report and fully considered by this Court in its Memorandum, Opinion and Order which stated:

> "The court does not find any of the factors cited to be so compelling as to warrant granting the requested relief. Apparently the only genuinely new fact raised by defendants at this time is that another action involving the same patents has been instituted against these defendants in California by a different plaintiff. The pendency of this third action does not so affect the interest of justice as to require a rejection of the magistrate's report and recommendations which the court accepts." (underscoring added)

Even if the California case is transferred to Chicago and remains in Chicago, this does not change its irrelevancy to this motion in view of the fact that it does not involve the plaintiff here in any way, as the Court recognized in the above quoted portion of its Opinion. Thus, the Court having already rejected this point, it should be given no weight on the motion to reconsider.

Moreover, defendants are arguing that the filing of the California action by Atari, Inc. and its transfer to Chicago create new facts instituting reconsideration of this Court's decision denying the motion here to transfer to Chicago. But that suit and its transfer to Chicago result in no different circumstances than Magistrate Hartenstine had in mind when he made his report which dealt with the questions of convenience and the interests of justice as between Chicago and New York. Thus, assuming the California suit is transferred and remains in Chicago, there would be no action involving the patents in suit anywhere but in Chicago and New York. That is exactly the state of facts existing during the Magistrate's deliberations.

Second, another point previously raised by the defendants and found to be without merit by the Court is defendants' assertion that plaintiff lacked good faith in detailing East Coast witnesses it plans to call. This point, having also been considered and rejected previously, should be given no weight on this motion for reconsideration. Moreover, as previously pointed out to the Court, the fact that plaintiff has not yet taken depositions of these witnesses has no relevancy on plaintiff's intention to call these witnesses at trial or to take their depositions prior to trial. However, as a matter of fact, so far as depositions on the East Coast are concerned, plaintiff has already taken depositions in Cambridge, Massachusetts, on October 28, 29 and 30, 1975, which depositions were noticed in

this action and attended by defendants' attorney, Theodore W. Anderson, the very attorney who signed the affidavit in support of defendants' motion for reconsideration. Other depositions in Massachusetts previously noticed for October 29 have been rescheduled to December 1, 1975, and the depositions of defendant Sanders Associates, Inc., and other witnesses in Nashua, New Hampshire, are scheduled to begin on November 20, 1975 on notice also filed in this action. Thus, defendants' suggestions to the contrary in this regard are misleading, at best. Further, it is still the intention of plaintiff to examine the remaining persons who were originally listed in the plaintiff's briefs either at trial in New York or by way of deposition.

Additionally, although it appears to be so obvious as to require no comment, defendants' arguments relating to certain witnesses in California whose employer required that it be paid for the amount of time spent on this matter, is totally irrelevant on the consideration of convenience as between the Court in Chicago and the Court here in New York. The misleading character of defendants' statements that witnesses can be paid to attend trial at any location is apparent when it is considered that, if those California witnesses were intended to appear at trial, there would have been no need to go to the time and expense of taking their depositions in California.

The only fact raised in connection with the motion for reconsideration and not previously considered by the Magistrate or the Court is that defendants Magnavox and Sanders just recently, in September, 1975, filed still another action in Chicago involving some, but still not all, of the patents that are in issue here. This new action was filed against Sears Roebuck & Company, but involves consumer products which are of a different type than the coin-operated commercial products in

the present suit, as was admitted by defendants, themselves. In that regard we note that in defendants' memorandum, on page 2, they state

> "Such apparatus [in the Sears case] are to be distinguished from the coin-operated, self-contained video games of the plaintiff [Midway] here."

Because all four of the patents in the New York suit are not present in the Sears suit, the Sears suit is not any more pertinent than the California suit, and because of the above noted difference in the type of products involved, it actually is less pertinent than the California suit. In other words, even though the Sears suit has three of the four patents involved here, all of the issues present here still are not present in any Chicago action. Also, of course, this recent Sears suit was filed more than 1 1/2 years after the action here and in no way relates to Midway, the plaintiff here.

Another misleading statement by defendants in their memorandum is that "Judge Flaum is hearing all of the five patent actions thus far filed relating to video games except this one." The true fact is that Judge Flaum has been assigned only three suits in the U.S. District Court for the Northern District of Illinois. But actually, the number of suits before Judge Flaum is not relevant to whether this present action should remain here in New York. Defendants here may continue to file other suits, but they are all subsequent to this action and none of the additional suits would involve the plaintiff here.

Defendants' new motion to reconsider is but another attempt to delay these proceedings and prevent plaintiff from going forward to have the issues here determined.

In view of the foregoing comments it is clear that no oral hearing is required and that defendants' motion for

reconsideration should be denied summarily on the papers presented by the parties.

Respectfully submitted,

MIDWAY MFG. CO.

By _____

Richard A. Huettner, Esq.
Kenyon & Kenyon Reilly Carr
& Chapin
59 Maiden Lane
New York, New York 10038
(212) 425-7200

Attorney for Plaintiff

Of Counsel:

Donald L. Welsh, Esq.
A. Sidney Katz, Esq.
Fitch, Even, Tabin & Luedeka
135 South LaSalle Street
Chicago, Illinois 60603
(312) 372-7842